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5. Trial (§§ 329, 343*)—General Verdict for Plaintiff Sufficient Notwithstanding Special Plea of Set-Off.—In action for cost of apples purchased by plaintiff for defendant and for commissions earned in so doing, where defendant filed special plea of set off for damages because of delivery of apples inferior to those contracted for, a general verdict for plaintiff was sufficient, being necessarily a finding in his favor upon the issue on the special plea, as well as upon the general issue, under Code 1919, §§ 6145, 6150.

Error to Circuit Court of City of Norfolk.

Action by Rush Lipscombe against Winn Bros. & Baker, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. W. Shelton and Alfred Anderson, both of Norfolk, for plaintiff in error.

Hicks, Morris, Garnett & Tunstall, of Norfolk, for defendant in error.

PRINCE *v.* BARHAM, et al.

June 10, 1920.

[103 S. E. 626.]

1. Wills (§ 625*)—Provision Held an Executory Devise.—Provision of a will that, should testator's daughter H. die leaving no children, land loaned to her by a prior provision "I leave in trust * * * for the benefit of my daughter V. and children," is an executory devise.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 850, et seq.]

2. Wills (§ 742*)—Interest in Executory Devise May Be Conveyed Before Happening of Contingency.—An executory devise stands on the same footing as a contingent remainder as concerns transmissibility of the subject thereof; and an interest in such subject may be conveyed, certainly by virtue of Code 1887, § 2418, prior to happening of the contingency on which the interest is appointed by the will to vest in right of possession, if the grantor then has a possibility of taking coupled with an interest, which he has if he then is an ascertained person to take under the devise; that is, if he is designated by name, or by class, all of which class are to take and one of which he is, subject, however, to reduction in quantity for any subsequent increase of the number of the class.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 859.]

3. Wills (§ 524 (2)*)—Children, to Whom an Executory Devise Was

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Made on Condition of H. Dying without Children, Held to Include One Living at Death of Testator, though Dying Before H.—Children of V. living at testator's death, and such as might afterwards be born before the death of H. leaving no children, including a child of V., who died after her, but before H., are the persons to take under the executory devise contained in the provision: Should H. die leaving no children, the property loaned her (by a prior clause of the will) "I leave in trust for the benefit of V. and children," to be managed as directed in regard to all property loaned to her; "managed" either being used in its ordinary sense, and not in the sense of managed and divided, or its use in the latter sense being so doubtful that the doubt will be resolved against such use, in favor of the rule that early, rather than deferred, vesting of estates and of rights of expectancy are favored in the law, notwithstanding clauses loaning property to V. provided, not only for its being managed by a trustee, and not being subject to debts of her husband, but also for it being divided at V.'s death among her living children and the descendants of any deceased.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 850, et seq.]

Appeal from Circuit Court, Sussex County.

Suit by Miles Barham and others against Hannah B. Prince. Decree for plaintiffs, and defendant appeals. Reversed and remanded.

R. H. Mann, of Petersburg, and *W. B. Cocke*, of Stoney Creek; for appellant.

R. W. Arnold, of Waverly, *Plummer & Bohannon*, of Petersburg, and *Buford & Peterson*, of Lawrenceville, for appellees.

CITY OF RICHMOND *v.* CHILDREY.

June 10, 1920.

[103 S. E. 630.]

1. Eminent Domain (§ 1*)—Right Wholly Statutory.—The right to take or damage private property for public use is wholly statutory, it is in derogation of the common law, and can only be exercised to the extent and manner provided by law, and the Legislature may delegate its power to appropriate subordinate agencies.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 70.]

2. Eminent Domain (§ 169*)—Resolution Directing Street Grading Must Precede Ascertainment of Damages.—Under Act March 12, 1908 (Acts 1908; c. 217), as amended by Act March 12, 1912 (Acts

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.